United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of mailing

75-1400

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P/S

To be argued by
JOSEPHINE Y. KING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1400

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS GRANDE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
PETER A. GOLDMAN,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1400

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS GRANDE,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Thomas Grande appeals from a judgment of conviction entered against him in the United States District Court for the Eastern District of New York (Bartels, *J.*) on September 5, 1975. Appellant was convicted, after a jury trial, of a one count indictment charging him with knowingly having been in possession of 19 quarter hinds of beef which had been part of a shipment of beef stolen from a tractor-trailer while moving as part of and constituting an interstate shipment of freight [1] in violation of Title 18, United States Code, Section 659.

[1] The indictment supplied by appellant is not the indictment on which he was tried. (See Appellant's Appendix) The indictment on which he was tried is dated September 19, 1974 and reads as follows:

[Footnote continued on following page]

Appellant was sentenced to a term of 3 years and fined $1500. He was sentenced to serve one month; the remaining term of the sentence, 2 years and 11 months, was suspended and appellant was placed on probation. Appellant is free on bail pending this appeal.

Appellant attacks his conviction on the grounds that the Government did not prove that the beef in Thomas Grande's meat locker was the beef stolen from the hijacked interstate shipment and therefore Grande's recent possession could not support an inference of guilty possession; that the Government relied upon Grande's explanation [2] of his purchase of the beef as an indication of consciousness of guilt but failed to prove the falsity of his exculpatory statement; that the government's case was a "mass of guesswork and vague innuendo" based on "very weak circumstantial evidence;" [3] and overall, that the evidence was insufficient to send the case to the jury and to support a verdict of guilty.

"On or about the 29th day of April, 1974, within the Eastern District of New York, the defendant Thomas Grande did wilfully and unlawfully receive and have in his possession approximately nineteen (19) quarters of beef having a value in excess of One Hundred Dollars ($100.00), which goods had been stolen from a tractor-trailer while moving as a part of and constituting an interstate shipment of freight from Dubuque, Iowa to New York, New York, the defendant Thomas Grande knowing the same to have been stolen. (Title 18, United States Code, Section 659)."

[2] Appellant had been tried for the same offense on April 23, 1975. The trial ended in a hung jury. Appellant testified at the first trial concerning the transaction which resulted in his purchasing and possessing the beef in question. He did not testify at the second trial but the court permitted some of his testimony from the first trial to be read into the record. (T. of July 17, 1975 at 30-32).

[3] Appellant's Brief at 13.

The United States contends that by direct and circumstantial evidence it proved each element of the crime with which appellant was charged. It did not invoke appellant's exculpatory statement as proof of consciousness of guilt and therefore assumed no burden to establish the falsity of the statement. The United States takes the position that the evidence adduced at trial met the standard of sufficiency to take the case to the jury, to support a verdict of guilty and to sustain an affirmance of the conviction.

Statement of the Case

The interstate shipment in question was described in a bill of lading dated April 22, 1974. By its terms, Dubuque Packing Company of Dubuque, Iowa was to ship 192 carcasses of beef to the consignee, Midtown Provisions, 2276 12th Avenue, New York City. The shipment weighed 38,703 pounds and was valued at $26,058.19. (Government's Exhibit 2). Richard Noel, Traffic Manager for Dubuque Packing testified as to the terms of the bill of lading (T. July 15, 1975 at 19-23), and Roger Hedrick, shipping dock supervisor of Dubuque Packing, testified that he personally supervised the loading of the trailer for this shipment (T. July 15, 1975 at 45). Each piece of beef bore Dubuque's identification number 396 assigned to it by the United States Department of Agriculture (T. July 15, 1975 at 66). Mr. Hedrick testified further that tags identifying the particularly shipment and purchaser are customarily placed on each quarter of cattle shipped (T. July 15, 1975 at 63).

Richard Wilson, a truck driver, picked up the loaded vehicle, trailer number 816, on Wednesday, April 24, 1974 at about 1:00 P.M. and on that same date signed the bill of lading. (T. July 15, 1975 at 88). He weighed

the loaded vehicle and testified to a gross weight of 70,000 pounds. Since his vehicle weighed 32,000 pounds when empty, he judged the weight of the load to be approximately 38,000 pounds, which conformed to the shipping weight on the bill of lading. (T. July 15, 1975 at 90-91).

The trailer load of Dubuque beef arrived at Midtown Provisions between 11:30 and 12 P.M. on Thursday night, April 25. Some hours later, the driver was informed that Midtown would not unload the shipment until the following Monday. He was directed to go to a motel and come back to Midtown on Monday morning. (T. July 15, 1975 at 98). Mr. Wilson drove his tractor trailer to the Getaway Motel, Secaucus, New Jersey, arriving there at approximately 2:00 P.M. on Friday, April 26, 1974. He obtained a room and parked his vehicle as close as possible to his room. At about 9:30 P.M. that same night, he checked his vehicle and confirmed that "the doors were locked, the seal was in tact, my padlock was on and the Thermo-King running and the temperature set . . ." (T. July 15, 1975 at 100). He went to sleep.

Upon awakening about 9 A.M. on Saturday, April 27, 1974 he went out to check the trailer. It was gone. In its place, an Allied moving van was parked. He called the Secaucus police and informed his supervisor that the trailer had disappeared. On Monday morning, April 29, 1974, he identified trailer number 816 (T. July 15, 1975 at 102) which had been found by the police at 11 P.M. on Sunday night, April 28 at Junius Street near Sutter Avenue in Brooklyn. The back of the trailer was "ajar" and there were pieces of beef and empty hooks on the floor as well as beef still hanging in the trailer. (T. July 17, 1975 at 34-36).

The location at which the trailer was recovered was approximately thirteen streets from appellant Grande's store. Special Agents Allen Garber and Thomas Lagatol went to Grande's store on Monday, April 29th, in response to a call from an informant. They identified themselves and the purpose of their visit, and advised appellant of his constitutional rights. Appellant related to the agents that between 9:00 and 10:00 o'clock Saturday morning, April 27, 1974 a man whom he had never seen before came to him and offered to sell beef at 40 cents a pound. Mr. Grande stated that he knew this price was less than half the price beef was selling for at the time. The man told Grande the meat came from a burned-out store. Grande agreed to purchase as much beef as would fit in his freezer.

About 3:00 P.M. on April 27, 1974, the same man returned with a companion, also alleged by Grande to be unknown to him, in an unmarked, unrefrigerated van. They placed nineteen pieces of beef in appellant's ice box for which appellant paid them $1,500 in cash. He told agent Garber he did not receive a receipt. (T. July 15, 1975 135-36). However, appellant's statement at his prior trial which was read into the record at the second trial disclosed he had received a receipt but later could not find it. (T. July 17, 1975 at 31). Also admitted as a statement from the first trial was appellant's explanation that he did not investigate the source of the meat by calling a wholesaler. (T. *Id.*).

With Grande's consent, the Special Agents inspected the icebox and found nineteen quarter hinds of beef in it. Dubuque Packing Company tags were attached to some of the pieces of meat; all nineteen quarters were marked with the Department of Agriculture stamp Num-

ber 396.[4] (T. July 15, 1975 at 137-38; Government's Exh. No. 3).

At this trial, the government produced testimony of a crucial fact omitted from its proof in the first trial. Robert Noel, traffic manager for the Dubuque Packing Company, testified that no shipment of Dubuque meat had been hijacked *subsequent* to the trailer which had disappeared during the night of April 26 and reappeared, but relieved of a substantial portion of its cargo, on April 28. Furthermore, searching the records and his own and his supervisor's memories, he asserted that no shipment had been hijacked *prior* to the load consigned to Midtown Provisions on April 22, 1974.

ARGUMENT

The proof adduced by the United States met the test of sufficiency of the evidence, establishing every element of the crime necessary to support a verdict by the jury that defendant was guilty beyond a reasonable doubt.

1. Sufficiency of the Evidence in General

Appellant's general contention is that the United States failed to produce sufficient evidence to send the case to the jury and to justify a conviction for the offense charged in the indictment.

The standard for sufficiency for sending a case to the jury was formulated in *Curley* v. *United States*, 160 F.2d 229, 232 (D.C. Cir. 1947) and adopted by this

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[4] Counsel for appellant and the United States stipulated that the minimum value of the beef was approximately $2,100. (T. July 15, 1975 at 62).

Court in *United States* v. *Taylor*, 464 F.2d 240, 243 (1972):

> "The critical point . . . is the existence or non-existence of reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury. . . .

And in *United States* v. *Wiley*, 519 F.2d 1348, 1349 (2d Cir. 1975), the Court stated: "In determining whether to submit a criminal case to a jury, the court must determine whether upon the evidence taken as a whole, a reasonable mind might fairly conclude that the defendant was guilty beyond a reasonable doubt."

Restated, the standard for passing upon a motion for a directed verdict of acquittal is expressed in the following language from *Curley* (*supra*, 160 F.2d at 232-233) quoted by Judge Friendly in *Taylor*, *supra*, 464 F.2d at 243:

> . . . whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

Once the appellate court determines that this standard is satisfied, "our task . . .," wrote Judge Friendly, "is the more limited one of determining whether errors prejudicial to the defendants occurred at the trial." (*United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir. 1963); *United States* v. *Robbins*, 340 F.2d 684, 687 (2d Cir. 1965); *United States* v. *Moret*, 334 F.2d 887, 891 (2d Cir. 1964) (Rautman, *J.*, concurring opinion). "If the

evidence reasonably permits a verdict of acquittal or a verdict of guilty, the decision is for the jury to make. In such a case, an appellate court cannot dispute the judgment of the jury." (*Curley, supra*, 160 F.2d at 237). The government submits that it has met the test of sufficiency and that the arguments advanced by appellant do not establish that any prejudicial errors were committed during the course of the trial.

A substantial portion of the insufficiency-of-evidence argument is rooted in appellant's opinion that the government's case consisted entirely of weak circumstantial evidence. In *Taylor*, the court addressed that issue specifically: "We in no way subscribe to the doctrine that 'where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than guilt' . . . ." (464 F.2d at 244). (See also, *United States* v. *Natelli and Scansaroli*, (Slip op. 1035 & 1036, July 28, 1975).

And finally, as part of appellant's general criticism of the government's proof, appellant objects to the inferences which may have been drawn from the evidence by the jury. Here, too, this circuit's position was made clear in *Taylor*. The question is "whether the reasonable mind of a juror could draw such an inference from it [the evidence] so that he 'might fairly conclude guilt beyond a reasonable doubt.' " (*Taylor, supra*, 464 F.2d at 244-45).

Before proceeding to an explanation of the government's evidence and the manner in which it conformed to the standard of sufficiency, a point raised for the first time on this appeal should be addressed. Appellant claims that certain of his statements at the first trial were introduced at the second trial in an attempt to demonstrate consciousness of guilt.

The Government read into the record of the second trial excerpts from Grande's testimony in the first trial.[5] These statements contained the following information: Grande paid $1500 for the beef, received a receipt but subsequently lost it, said the meat "had to come from a wholesaler" but did not call any wholesaler, and stated that there was no company name on the truck in which the meat was delivered (T. July 17, 1975 at 30-32).

The Government did not offer Grande's explanation as proof of consciousness of guilt. Rather, the jury was entitled to hear appellant's version of the transaction in addition to Agent Garber's testimony recounting Grande's statements to him. The Government thereby assumed no obligation to demonstrate that Grande lied. It was for the jury to accept or reject his explanation. (*United States* v. *Leitner*, 202 F. Supp. 688, 694 (S.D.N.Y. 1962).

2. Proof that Appellant Possessed the Goods Stolen from the Hijacked Trailer.

Turning now to the specific evidentiary requirements of Section 659 of Title 18, United States Code, the government was called upon to prove beyond a reasonable doubt:

(1) that the defendant had in his possession stolen goods,

(2) of a value of more than $100,

(3) which were part of an interstate shipment,

(4) and he knew that the goods had been stolen.

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[5] Contrary to defense counsel's declaration in his opening remarks, (T. July 15, 1975 at 15), he did not call Grande to testify at the second trial. The Government had conducted its case with the expectation that Grande would testify to the transaction by virtue of which he was in possession of beef consigned to Midtown Provisions. To overcome partially the disadvantage occasioned by defense counsel's decision not to put Grande on the stand, Judge Bartels admitted a limited portion of Grande's prior testimony.

Appellant does not contest the value of the goods or that there was an interstate shipment. Appellant claims however, that the government has not proved that the beef in his icebox was the identical meat missing from the hijacked trailer and that he had knowledge that the beef in his icebox was stolen meat.

On the first of these points—identification of the beef Grande purchased as a part of the stolen beef—appellant argues that it was not sufficient for the government "to show that the goods possessed were 'similar' to those stolen." (Appellant's Brief at 8). In support of this position, appellant cites *Karn* v. *United States*, 158 F.2d 568 (9th Cir. 1946). In *Karn*, defendant was tried for larceny. The key prosecution witness was able to testify only that a $10 bill found on the defendant was similar to the one he had had in his cash register. He was unable to identify the bill with any greater degree of specificity.

By no stretch of the imagination can the proof in *Karn* be equated with the evidence produced by the government in the instant case. Here, a locked trailer load of Dubuque beef, marked with shipping tags and branded "396" arrived in New York and proceeded to New Jersey under the constant supervision of the truck driver. His last act, before the trailer was stolen during the night of April 26 or the early morning hours of April 27, was to check the seal and padlock on the trailer. The same trailer was found by the police on April 28, doors ajar, with part of the load missing. Precisely during the interval of time (the business hours of April 27) between the disappearance of the trailer and its recovery by the police, appellant Grande purchased Dubuque beef at half the market price from strangers who delivered the meat in an unmarked truck. The tagged and branded beef quarters were observed and photographed in Grande's icebox by two FBI agents on April 29.

But, appellant argues, the Dubuque Packing Company ships large quantities of meat to New York and in fact, ships meat twice a week to Midtown Provisions, the consignee of the load of beef in question. Therefore, the meat in Grande's icebox could have come from a different shipment. Unfortunately for appellant, the uncontroverted testimony of Mr. Noel, traffic manager for Dubuque Packing Company, demolished the possibility of any mistake as to the source of the beef in appellant's possession. No other shipment of Dubuque meat had been hijacked prior or subsequent to this shipment within any relevant period of time. (T. July 15, 1975 at 24-25, 29-32). Both on direct and cross-examination, the witness' testimony was unequivocally clear on this crucial fact.

It is apparent from the record that the jury focused on the question of whether the beef in Grande's possession came from the hijacked trailer. During their deliberations, they addressed the following question to the Court:

> "Do we have to prove the meat came from the trailer?"

Judge Bartels answered:

> "You don't have to prove anything. Do you mean does the government have to establish the meat came from the trailer? Yes, they have to establish the meat came from this particular trailer that was found thirteen blocks away. Yes, definitely." (T. July 17, 1975 at 94).

In returning a verdict of guilty, the jury found beyond a reasonable doubt that the government had proved the meat in appellant's possession was part of the stolen shipment.

3. Proof of Guilty Knowledge

Appellant contends that the government's proof is insufficient to establish that Grande knew the beef in his icebox was stolen beef.

This Court in *United States* v. *Jacobs*, 475 F.2d 270, 287 (1973), approved the trial court's charge that "it is not necessary that the Government prove to a certainty that defendant knew the bills were stolen . . ." On the other hand, "merely demonstrating negligence or even foolishness" is not enough. But "reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth . . ." may satisfy the requirement of knowledge. (*Id.* at 287-88, *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975).

The United States Supreme Court in *Wilson* v. *United States*, 162 U.S. 613, 619 (1896) stated the rule which has been applied in this circuit:

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight, unless explained by the circumstances or accounted for in some way consistent with innocence.

(See also *United States* v. *Casalinuovo*, 350 F.2d 207, 211 (2d Cir. 1965); *United States* v. *Fay*, 332 F.2d 1020, 1022 (2d Cir. 1964).)

The law must permit such an inference for it is not possible to look into the mind of another and to discover with certainty whether he or she has direct and actual knowledge of a fact. Rather, guilty knowledge is established by analysis of the individual's conduct, the circumstances and all the relevant facts. "Studied ignor-

ance" may, in the words of Judge Feinberg, "constitute an awareness of so high a probability of the existence of the fact as to justify the inference of knowledge of it." (*United States* v. *Joly*, 493 F.2d 672, 675 (2d Cir. 1974); *United States* v. *Dozier*, 522 F.2d 224, 227 (2d Cir. 1975).

In *United States* v. *DeKunchak*, 467 F.2d 432, 436 (2d Cir. 1972), this Court affirmed the inference of guilty possession where the goods (Vitamin B-12 concentrate) in defendant's possession bore the same labels as those missing from a warehouse, the compound was chemically identical to the B-12 that had disappeared and was sold for less than half of its value. On the latter point, Judge Learned Hand wrote: "In prosecutions for receiving stolen property for obvious reasons one of the most telling indices of guilt is a low price paid by the receiver." (*United States* v. *Werner*, 160 F.2d 438, 443 (2d Cir. 1947).

The recent opinion of Judge Van Graafeiland in *United States* v. *Clark* (Slip op. 1268, decided October 31, 1975) provides incisive analytic guidelines for evaluating the conduct and circumstances from which guilty knowledge may be inferred. In *Clark*, an attorney was convicted of transporting a stolen diamond in interstate commerce despite his protestations that he purchased the jewel from a friend (since deceased). The jury, wrote Judge Van Graafeiland, could properly conclude from certain indicia of knowledge that the attorney knew the ring had been stolen. The indicia applicable to the instant case are:

> The price paid for the goods was substantially below its market value.
>
> There was no documentary evidence of the purchase.

> The purchaser was not a novice but a butcher of many years' experience who was familiar with the prices, sources of supply and the quality of meat.

These facts which would cast at least some shadow of suspicion on the transaction may be supplemented by others which appellant would have us believe are merely fortuitous and coincidental. Grande's icebox was empty on that Saturday morning—a busy shopping day for weekend purchases of food. His normal supplier would have been a wholesaler, and from his many years in the trade, he should have been well acquainted with wholesalers in the New York area. But his supplier this Saturday morning was a stranger who arrived in an unmarked truck and insisted on immediate, full payment in cash.

Mindful of all of these facts, the jury in this case, as in *Clark*, "could well have rejected his claim of innocent ignorance and concluded that he deliberately closed his eyes to avoid knowledge of the theft or proceeded with a reckless disregard of whether it had taken place." (*Clark*, *supra*, at 6403). It is submitted that the inference of guilty knowledge is manifestly a reasonable inference in this case and that upon the totality of the evidence the jury could find the defendant guilty beyond a reasonable doubt.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
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JOSEPHINE Y. KING,
PETER A. GOLDMAN,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 9th day of January, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Vincent F. Tomaselli, Esq.
125-10 Queens Blvd.
Kew Gardens, N.Y. 11415

Evelyn Cohen

Sworn to before me this
9th day of Jan. 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

E NOTICE that the within
for settlement and signa-
of the United States Dis-
s office at the U. S. Court-
nan Plaza East, Brooklyn,
____ day of _____,
o'clock in the forenoon.

New York,
_____, 19____

_____
States Attorney,
for _____

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__ day of _____
, in the office of the Clerk of
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n, New York,
_____, 19____
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States Attorney,
ey for _____

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or _____

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UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355